LEE LAI SIEW v. PUBLIC PROSECUTOR VOON WEE HIAN & ORS. v. PUBLIC PROSECUTOR

[A.Cr.J. (B.T.H. Lee J.) July 25, 1977]

[Kota Kinabalu Criminal Appeal Nos. 15 and 16 of 1976]

Criminal Law and Procedure — Causing death by rash or negligent act — Overloading of ship — Submersion of load line — Sending unseaworthy ship to sea — Interference with findings of fact — Identification — Penal Code, s. 304A — Sabah Merchant Shipping Ordinance, 1960 (No. 11 of 1960), ss. 141, 142, 145, 169, 197, 248 and 254.

Shipping Law — Overloading — Submersion of load line — Sending ship to sea in unseaworthy state — Meaning of "seaworthy" — Merchant Shipping Ordinance, 1960.

These cases arose out of the sinking of a passenger ship "Nanukan Express." The ship was allegedly carrying passengers far in excess of the authorised number of 80 passengers and 4 crews. The ship was put to sea and travelled for about half an hour. Owing to the alleged overloading, undermanning and other defects of the ship, she sank resulting in the loss of lives. The appellant in the first case was the acting master of the ship. He was charged with 6 charges under the Merchant Shipping Ordinance, 1960 and 1 charge under section 304A of the Penal Code. The appellants in the second case, the partners of the company owning the ship were charged with offences under the Merchant Shipping Ordinance. The appellants appealed against their convictions.

Held: (1) in the circumstances of this case it would be wrong to attribute to the appellant, the acting master, the alleged negligence of overloading resulting in the loss of lives and therefore the conviction under section 304A of the Penal Code must be set aside;

(2) the learned Magistrate was in error in holding that there were 172 passengers on the boat as the evidence showed that there were 147 passengers on the boat. The convictions for carrying excessive passengers must be affirmed but the fines should be reduced;

(3) the prosecution in this case had not discharged the onus of proving the offence of submersion of the load line under section 169(1) of the Merchant Shipping Ordinance and therefore the convictions on this charge must be quashed;

(4) section 197(1) of the Merchant Shipping Ordinance which makes it an offence for any person to send or attempt to send or is a party to sending a ship to sea in an unseaworthy state can only apply to persons who are proved to come within the section. An offence under the section can be punished by a fine.

Cases referred to:-

(1) *Public Prosecutor* v. *P.G. Mills* [1971] 1 M.L.J. 4.
(2) *Adnan bin Khamis* v. *Public Prosecutor* [1972] 1 M.L.J. 274.
(3) *Jaimal Singh* A.I.R. 1932 Lah. 366.
(4) *Raghu* (1914) 16 Cr. L.J. 72.
(5) *Hari Singh* A.I.R. 1969 Raj. 86.
(6) *Emperor* v. *Akbar Ali* 1936 Oudh 400.
(7) *Yuill* v. *Yuill* [1945] P.D. 19.
(8) *Powell* v. *Streathem Manor Nursing Home* [1935] A.C. 243.
(9) *Watt* v. *Thomas* [1947] A.C. 484.
(10) *Benmax* v. *Austin Motor Co. Ltd.* [1955] 1 All E.R. 326.
(11) *Montgomerie & Co. Ltd.* v. *Wallace-James* [1904] A.C. 73.
(12) *Public Prosecutor* v. *Lim Kuan Hock* [1967] 2 M.L.J. 114.
(13) *Teay Way Cheong* v. *Public Prosecutor* [1964] M.L.J. 21.
(14) *Fazal Din* v. *Public Prosecutor* [1949] M.L.J. 123.
(15) *Subramaniam* v. *Public Prosecutor* [1956] M.L.J. 220.
(16) *Lucas* v. *Williams & Sons* [1892] 2 Q.B. 113.
(17) *Federal Steam Navigation Co.* v. *Dept. of Trade* [1974] 2 All E.R. 97.
(18) *Shaik Meera & Anor.* v. *R.* [1955] M.L.J. 158.
(19) *Mohamed Ali* v. *Public Prosecutor* [1965] 1 M.L.J. 261.
(20) *R.* v. *Ramachandrappan* I.L.R 6 Nag. 249.
(21) *Public Prosecutor* v. *Lim Teik Heng* [1962] M.L.J. 264.
(22) *Tuck & Son* v. *Priester* (1887) 19 Q.B.D. 629.

CRIMINAL APPEAL.

C.T. Wong for the appellants.

Abdul Wahab Patail (Deputy Public Prosecutor) for the respondent.

B.T.H. Lee J.: In this case there are two criminal appeals, the charges of which are more or less identical. They were consolidated at the hearing before the Magistrate's Court, Tawau, and now form one set of proceedings.

(a) *Criminal Appeal No. 15/76* —
Lee Lai Siew v. *Public Prosecutor*

(b) *Criminal Appeal No. 16/76* —
1. *Voon Wee Hian*)
2. *Pao Chong Zen*)
3. *Lau Ka Hin*) v. *Public Prosecutor*
4. *Shim Si Yong* (*f*))

Lee Lai Siew, the last-minute appointed master of the ship called "Nunukan Express" was charged with 6 charges under the Merchant Shipping Ordinance 1960 (Sabah No. 11 of 1960) hereinafter called "the Ordinance" and 1 charge under section 304A of the Penal Code.

The charges are: —

(1) Section 141(1) — Penalties for excess passengers.
(2) Section 142(a) — False declaration.
(3) Section 145(2) — Fine of $500 in addition to a fine of $50 for every excess passenger permitted to be carried.
(4) Section 169(2) — Submersion of load line.
(5) Section 197(2) — Sending unseaworthy ship to sea.
(6) Section 304A Penal Code — Causing death by negligence.

The four appellants, the partners of Syarikat Kalimantan Express Tawau and owners of the "Nunukan Express" in Criminal Appeal No. 16/76 were also charged with offences under the Ordinance as follows:—

(1) Section 141(1) — Penalties for excess passengers.
(2) Section 142(a) — False declaration.
(3) Section 145(3) — Liable to like penalty for carrying excess passengers.
(4) Section 169(2) — Submersion of load line.
(5) Section 197(1) — Sending unseaworthy ship to sea.

The appellants in both appeals were convicted of all offences charged (except under section 142(2) in which all were acquitted and discharged of that offence).

In respect of *Lee Lai Siew* (Criminal Appeal No. 15/76) he was sentenced and fined as follows: —

(1) First Charge, Section 141(1) — Fined $1000 or 6 months.
(2) Second Charge, Section 142(a) — Acquitted and discharged.
(3) Third Charge, Section 145(2) — Fined $5000 or 10 months.
(4) Fourth Charge, Section 169(2) — Fined $1000 or 6 months.
(5) Fifth Charge, Section 197(2) — Two years' imprisonment.
(6) Sixth Charge, Section 304A Penal Code — Six months' imprisonment.

In respect of *Lau Ka Hin*: —

(1) First Charge, Section 141(1) — Fined $1000 or 6 months.
(2) Second Charge, Section 142(a) — Acquitted and discharged.
(3) Third Charge, Section 145(2) — Fined $5000 or 10 months.
(4) Fourth Charge, Section 169(2) — Fined $1000 or 6 months.
(5) Fifth Charge, Section 197(1) — Fined $1500 or 7 months.

In respect of *Voon Wee Hian, Pao Chong Zen* and *Shim Si Yong* (partners of Syarikat Kalimantan Enterprise Tawau) they were convicted and sentenced as follows: —

(1) First Charge, Section 141(1) — Fined $500 or 3 months.
(2) Second Charge, Section 142(a) — Acquitted and discharged.
(3) Third Charge, Section 145(2) — Fined $500 or 6 months.
(4) Fourth Charge, Section 169(2) — Fined $500 or 3 months.
(5) Fifth Charge, Section 197(1) — Fined $750 or 4 months.

The brief facts of the case with regard to the charges are that on March 4, 1975, at about 4.30 p.m., a passenger ship "Nunukan Express" belonging to Syarikat Kalimantan Enterprise left Tawau wharf for Sebatik and Nunukan. The ship was allegedly carrying passengers far in excess of the authorised number of 80 passengers and 4 crews. The ship was put to sea and travelled for about half an hour. In about 15 minutes the ship would have reached Sebatik Island. But owing to the alleged overloading, undermanning and other defects of the ship she sank resulting in the loss of lives.

It is in my view convenient and perhaps logical to deal first with section 304A, Penal Code, i.e. the 6th Charge against *Lee Lai Siew*. The charge reads as follows: —

"That you on March 4, 1975, at about 5.30 p.m. in the waters off the coast of Tawau, in the District of Tawau in the State of Sabah caused the death of the persons listed in attached Annexure, by doing a negligent act not amounting to culpable homicide, to wit, you as master of the passenger ship 'Nunukan Express' took the ship to sea in such a state and so loaded as to endanger human life and that you thereby committed an offence punishable under section 304A, Penal Code."

State and condition of Sea and Waves

As to the state and condition of the sea and the waves, the defence contended that the evidence shows the direct cause of some of the deaths was due to drowning as a result of the sinking of the ship due to the rough sea at the place of sinking, the winds and the swell.

The ship being loaded with sea water in less than 5 minutes, the panic of passengers rocking the boat, thus making it unstable and thus more water got into the boat. The elements and the panic action of the passengers were the direct cause of the sinking of the ship. Overloading if there is can only be a very remote fact in causing the sea tragedy.

The learned Magistrate in his judgment in Criminal Appeal No. 15/76 at page 17 said:

"The weather was normal. Evidence was adduced to show that even the tide that day was low in the afternoon the high water at 2156 hours was 1.9 metres. The waves were normal even in the rough patch nothing unusual. The major factor is that if the passengers were not overcrowded the ship would not have sunk. Prosecution submitted that there was no big wave. Except for 2 sleeping passengers all others said that they were normal waves."

In view of the above findings of the learned Magistrate it becomes necessary to refer to the evidence of certain prosecution witnesses on this point.

PW1 — PC48299 Awang Kassim

He says: "It takes 45 minutes for me to go to Sebatik Island. Ordinary boats 2 hours. On 4th March at about 5 p.m. the accident occurred. With another 15 minutes it would have reached Sebatik Island. The boat was going at speed. *It was going smoothly.* After half an hour it capsized. . . ."

PW3 — Ludiah Saisah

"I was sitting at the middle portion of the left side. *The water was rushing in front from the bow of the boat. The glass in the front part was broken when the water rushed in.* At first it was bit by bit and then suddenly water pushed in . . . The *sea was rough* at that time. There was a wave and it was a big wave. . . ."

PW4 — Ludiah binti Benedelangi

"I jumped with the plank into the sea. *These waves were big waves.*"

PW5 — Maria binti Sampe

"I saw water rushing in from the door. It was the front door. *Once the glass was broken the water rushed in.*"

PW126 — Ismail bin Mohd.

". . . between Sebatik and Tawau there is *a stretch which is rough.* It depends on the weather . . . I have seen that the *waves in particular place were very rough.* It is a *notorious spot,* all the people know that that it was a *rough spot.* Boats usually avoid the spot."

PW2 — Bertrand Stuart Lee

"The trip from the wharf to the windy spot was smooth and comfortable . . . the *water at the windy spot was rougher than the earlier stretch.*

It was the defence contention that if the accident was due to overloading, the ship when it was put to sea would not be smooth and comfortable.

It is convenient at this stage to refer to two prosecution witnesses on this point.

PW12 — Fran Faah

"The tragedy occurred after less than half the journey to

Sebatik nearer to Tawau. It was about 20 minutes after the boat left. *Before the tragedy the boat was travelling in a normal way.*"

PW40 — Abd. Rahman bin Kiat

"The vessel was *going on normally. The front door was broken open by water....*"

Now under this charge, the prosecution duty is to establish two important ingredients, viz:

(1) That the master did a negligent act;

(2) That the negligent act was the direct cause of the death of the person.

The law on this is contained in a passage found at page 811 of *Ratanlal* (22nd edition) under the heading:

"Death must result from rash or negligent act"

The rash or negligent act means the act which is *the immediate cause of death* and not any act or omission which can at most be said to be *a remote cause of death.*

This point is further illustrated and dealt with by our own courts. I refer to the headnote to *Public Prosecutor* v. *P.G. Mills,*[1] a Court of Appeal of Borneo decided in Brunei in 1955 and which was specially reproduced 16 years later at [1971] 1 M.L.J. 4, the decision of which was approved by our Federal Court of Appeal in *Adnan bin Khamis* v. *Public Prosecutor.*[2]

The headnote of *Public Prosecutor* v. *F.G. Mills* reads:

"The nature and degree of negligence in an act causing death required to support a conviction under section 304A, Penal Code, is the same as that in any other act carried out so rashly or negligently as to endanger human life or the safety of others where the act was the *immediate cause of the death* and *not the remote cause.*"

Overloading of Ship

It was the prosecution case that the alleged "overloading" on the part of the master was the direct cause of the death of the passengers in question.

The learned Magistrate in his judgment at pages 18 and 19 expressed himself as follows: —

"I have considered his statement from the dock which has raised no doubt in my mind. The most important fact was by *overcrowding and overloading* the ship there arose a situation which was fraught with risk and danger. He disregarded this and as a result the ship sank with the loss of 38 lives. I find the offence proved."

Counsel have not however been able to refer me to any reported case on this point but there is a passage at page 816 of *Ratanlal* which reads: —

"*Overloading* of a lorry may be an offence under the Motor Vehicles Act, but it cannot be regarded as a rash and negligent act within the meaning of this section (i.e. section 304A Penal Code). *Jaimal Singh.*"[3]

and lower down: —

"Similarly the *overcrowding of a boat* which capsized owing to strong wind was held to be no offence under this section. *Raghu.*"[4]

Defects — obvious and not obvious

Stress was made as to the defects which are obvious and others which are not so obvious.

Defence, on the other hand, referred the court to the evidence of *Stephen Lee Kui Thiam* (DW1).

DW1 says in evidence:

"I have been in the service of the Ship Survey Division of the Marine Department for almost 20 years. I knew a ship called 'Nunukan Express'. I have surveyed this vessel.... the second occasion was when I surveyed the vessel in 1974. At the time of my inspection the fire pumping system and all the fire fighting appliances were in good condition."

(See Exhibit D2 — Safety Certificate issued in August 1974).

It was further pointed out by defence that the accident happened in March 1975. This is still covered by the survey made in August 1974. The next survey was not due until August 1975, that is in about 5 months time after the tragedy.

It seems to me the answer to this question is to be found again in *Ratanlal* at page 816 — second paragraph, where the learned author says: —

"If the *mechanical defect* in the vehicle was such that it could not be detected without meticulous examination of the machinery, it cannot be laid down that criminal liability could be fastened on the accused on that ground. *Hari Singh.*"[5]

Further, on the question of defects, I would refer to the case of *Emperor* v. *Akbar Ali,*[6] the headnote of which reads: —

"The rash and negligent act referred to in section 304A means the act which is the *immediate cause of death* and not any act or omission which can at best be said to be a *remote* cause of death.

Where there was no rashness and negligence on the part of a lorry driver charged under section 304A for having run over and killed a woman, so far as his use of the road and the manner of driving was concerned, the fact that the accused's *lorry had no horn* or had *inefficient brakes* cannot be taken into consideration in convicting the accused under section 304A though they can be made the subject of a prosecution under the Motor Vehicles Act, when it is clear that the *absence of the horn* or the *inefficiency of the brakes* was not in any way responsible for the accident."

It falls to be observed that the learned Magistrate at page 14 of his judgment in Criminal Appeal No. 15/76 said: —

"As I have stated in regard to the other charges, 172 passengers were proved to be on board...."

and further down: —

"The accused by *allowing 172 passengers* had created a situation which was fraught with danger. It was an act of negligence of great significance. *It caused the sinking of the vessel* resulting in the death of 38 persons."

That is a finding of fact, and this court cannot interfere with his finding unless this court is of the opinion that in the process of arriving at the conclusion of fact the lower court misdirected itself as to the law.

It is well settled that the principle by which the appellate court is to be guided in deciding whether to interfere or to refuse to interfere with findings of fact in the court below, have been discussed many times in the Malaysian courts, and the well-known line of authorities — *Yuill* v. *Yuill,*[7] *Powell* v. *Streathem Manor Nursing Home,*[8] *Watt* v. *Thomas*[9] and *Benmax* v. *Austin Motor Co. Ltd.*[10] have from time to time been considered.

The law as regards inference was laid down in the case of *Montgomerie & Co. Ltd.* v. *Wallace-James.*[11] Here I would quote a passage from the judgment of the Earl of Halsbury L.C. who said at page 75: —

"Where no question arises as to the truthfulness and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate court."

This case was referred by Viscount Simonds in *Benmax* v. *Austin Motor Co. Ltd.*[10] It explains how the principle should be applied in such circumstances as stated.

I ought perhaps to refer very briefly to a recent case in *Public Prosecutor* v. *Lim Kuan Hock*,[12] where Ong J. (as he then was) said at page 115: —

"It is rare that an appellate court interferes with a finding of fact of the trial court but that it has power to do so cannot be disputed."

Reverting to the facts of the case now before me, it was in evidence that the ship sailed normally for about half an hour. In another 15 minutes the ship would have arrived at Sebatik Island. There was evidence of heavy waves which hit against the ship and which broke the window glasses. There can be no doubt in my view that those found drowned met with their deaths through drowning caused by the waves, the winds and swell at the rough patch referred to by the witnesses. There was also evidence that the waves resulted in creating confusion and panic seized the passengers on board the ship.

Overloading if there be, can only be a very remote fact in causing this tragedy.

Where, under circumstances such as existed in the present case it would in my view be wrong to attribute to the appellant, *Lee Lai Siew*, the alleged negligence of overloading resulting in the loss of lives.

I would therefore allow his appeal, set aside the conviction and sentence.

Excess Passengers

I now pass to a consideration of the first charge. As against *Lee Lai Siew*, the master of the ship, it reads: —

"That you on March 4, 1975, at about 5.30 p.m. in the waters off the coast of Tawau, in the District of Tawau in the State of Sabah being the master of the passenger ship 'Nunukan Express' did have on board the said ship 172 passengers which having regard to the time occasion and circumstances was in excess of the number allowed by the passenger certificate which is 84 passengers and that you thereby committed an offence punishable under section 141(1) Merchant Shipping Ordinance, 1960."

As against the *partners* of "Nunukan Express", the charge is: —

"That you on March 4, 1975 at about 5.30 p.m. in the waters off the coast of Tawau, in the District of Tawau in the State of Sabah, being the owners of the passenger ship 'Nunukan Express' did have on board thereof 172 passengers which having regard to the time, occasion and circumstances was in excess of the number allowed by the passenger certificate which is 84 passengers and that you thereby committed an offence punishable under section 141(1) Merchant Shipping Ordinance, 1960."

It is convenient at this stage to set out section 141(1) of the Ordinance which is in these terms: —

"The owner, agent, charterer or master of any passenger ship shall not receive or have on board thereof at any place within North Borneo waters any number of passengers which having regard to the time, occasion, and circumstances is in excess of the number allowed by the passenger certificate, and in default he shall be guilty of an offence and shall be liable to imprisonment for six months and a fine of one thousand dollars."

The point taken by the defence is that James Kong Thing Guan (PW42) was appointed Manager of Syarikat Kalimantan Enterprise at Tawau and is their agent in operational control of "Nunukan Express". There is non-interference of all the appellants in the management of their business in Tawau.

It is in evidence that Betty Chen Shuk Moi (PW120), the ticket seller, was prepared to infringe the law owing to insistence of the passengers. She sold 105 tickets altogether, the maximum is 80.

At this point, it falls to be noted that the authorised master was on leave on February 26, 1975 and between February 26 until March 3 the engine driver was the Serang.

An arrangement arrived at and under which the engine driver Lee Lai Siew was to act as Serang. It was on that account necessary for Lau Ka Hin and Voon Wee Hian to intervene and to procure the authorisation of Lee Lai Siew as Master.

Excess Passengers

I would refer to the evidence of the Marine Officer, *Masri bin Mohamed Gaha* (PW127), who is Ag. Port Officer, Marine Department, Tawau (page 89 of Record). He said: —

"Lau Ka Hin and Voon, two accused, came to the office. He told me that the 'Nunukan Express' had no juragan... Lau Ka Hin suggested to me to authorise Lee Lai Siew to act as Master... I considered him (Lee) to be competent to act as Master. I knew that the law requires the Master of a ship should have a certificate of competency but I authorised him because of his experience...."

I now turn to the law established by the authorities. The question that then arises is the point of *identification*. It is clear duty of the prosecution to prove conclusively the identity of the deceased persons.

According to the case *Teay Wah Cheong* v. *Public Prosecutor*[13] it was there held that the identity of the deceased person was not conclusively proved. It is not sufficient to say that he received an injured person from a police corporal and that the patient was *AB*. The medical officer had to state as to where he obtained the name of the injured person unless he knew the injured person personally. The police corporal who took *AB* to the hospital did not say in his evidence that he identified *AB* to the medical officer. There is nothing in the record to show how the medical officer obtained *AB's* name. The medical officer stated *inter alia* that the "patient died at 10.30 a.m. the same day" and "I handed the deceased to his relative on the same day". In my opinion this is not sufficient to prove identification of the deceased person the medical officer should have stated clearly that he personally saw the dead body of *AB* and that he personally handed the dead body of *AB* to the relative who should have been called for identification by the medical officer. There does not appear to be in the record of proceedings who this "relative" was. The wife of *AB* simply stated that she accompanied her husband to the hospital with the police and she identified her husband to the police on the same day the husband died.

However, in *Fazal Din* v. *Public Prosecutor*[14] a Court of Criminal Appeal case not cited in argument by which this court is bound decided 15 years earlier laid down the proposition which is now contained in *Teay Wah Chong's* case.

Willan C.J. in the course of his judgment said in the headnote: —

"That where a case involves the death of a person on which a post-mortem examination has been held, evidence must be given that the body on which the medical officer conducted the post-mortem examination was the body of the deceased in respect of whose death the charge has been laid and that because of the failure to do so in this case, the conviction for murder could not be sustained."

That case also decided that: —

"The failure of the trial judge to put the possibility that the deceased might have died from violence from a source other than the accused, amounted on the facts of the case to a misdirection."

I deal next with the question of *Hearsay Evidence*.

On behalf of the appellants, counsel has argued before me that evidence of a statement made to a witness by a person who is not himself called as a witness may be hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. (See *Subramanian* v. *Public Prosecutor*[15]).

The question that arises for determination in this appeal is upon what basis, if any, was the number of passengers in excess of 84 passengers arrived at?

Upon the evidence the number of passengers on board the ship proved according to law is as follows: —

Prosecution called.

(a) 58 passengers on the Passenger List (Exhibit P2) who gave evidence in court ... 58

(b) 44 passengers gave evidence although these 44 passengers were not included in the Passenger List ... 44

Next,

(c) There is evidence that those 102 passengers (58+44) said in the course of evidence that they had seen certain passengers the names of which they gave on board the ship.

It was objected to by the defence that these 12 passengers were not called to give evidence nor were they identified by those who said they saw them on board the ship. Reliance was placed on the authority of *Public Prosecutor* v. *Subramaniam* which was referred to earlier.

As a result of such researches as I have been able to make I have discovered a Court of Appeal case *Lucas* v. *Williams & Sons*,[16] not cited by either counsel in argument where Lord Esher M.R. said at page 117: —

"In the same way, where it is necessary to prove that a man was at a particular place on a given day, you call a witness to say that he knows *AB*, and that the man he saw at such a place on such a day was *AB*. That evidence is enough without producing *AB*."

Relying on *Lucas's* case the number 12 should be added. ... 12

(d) Of the 38 deceased passengers, it is proved that 19 passengers appear in the Passenger List. This in my view is purely a question of fact turning principally on documentary evidence. (Exhibit P2) ... 19

(e) Of the 38 deceased passengers it is proved that 7 of them were properly identified in accordance with the authority of *Fazal Din* v. *Public Prosecutor* already referred to.

It is to be observed that of the 7 deceased passengers 2 of their names appear on the Passenger List but 5 of the deceased passengers were not listed. Therefore we add another 5. ... 5

(f) Of the 21 persons untraced 9 of them appear on the Passenger List ... 9

The total number of passengers is therefore 58+44+12+19+5+9=147. ... 147

The number of passengers in excess of the authorised number of 84 is therefore 147—84 =63. ... 63

In so holding that the number is 147, I have not overlooked although I disagree with the learned Magistrate that he had made a finding of fact that it was 172.

Again I make reference to *Benmax's case* on the question of inference dealt with in section 304A, Penal Code.

I would add here that the number in the lower court was an error, but nevertheless not such an error as could possibly have prejudiced the defence in the least, and was of no consequence.

Prosecution has in the meantime found an authority *Federal Steam Navigation Co.* v. *Dept. of Trade*[17] in support of the proposition that the word "or" occurring in the phrase "the owner, agent, charterer *or* master" in section 141 is used conjunctively and not in the alternative and exclusionary sense. However, in the Oil in Navigable Waters Act, 1955, the legislation with which the *Federal Steam Navigation case* is connected, the phrase "owner *or* master" is used in six sections, namely sections 1, 3, 4, 5(1), (3), 10 and 13 in an Act containing 25 sections. I am unable to find the phrase "owner *and* master" in any of the sections in that Act.

The Merchant Shipping Ordinance with which this court is concerned has in all 281 sections.

It is to be observed that: —

(a) the phrase "owner *or* master" occurs in six sections — sections 26(1), (3); 121(2), (4); 129(1); 170(a); 175(3); and 194(3).

(b) the phrase "master, owner *or* agent" occurs in three sections — sections 132(1); 133(1), (2); 136(1), (3).

(c) the phrase "owner, agent, charterer *or* master" appears only in one section, i.e. section 141(1), the subject matter of the present charge.

But (a) the phrase "owner, agent *and* master" occurs in one section, i.e. section 86(1), (2).

(b) the phrase "owner *and* master" appears in sections 153, 168(3) and 169(3); and

(c) the phrase "owner, agent, charterer *and* master" occurs in one section 148.

The defence says, with which I agree, that in construing section 141(1), the intention of the legislature is to punish the person or persons who are responsible for receiving or in having the excess passengers on board knowing that the passenger certificate does not so allow. The words used in this particular subsection is "or" and not "and" and ended with the word "he" shall be guilty. Following the same pattern are sections 121(4), 133(2), 136(1), of the Ordinance, whereas in sections where the word "and" is used, the language of the section, for example, section 168(4) reads: —

"If any ship proceeds or attempts to proceed to sea in contravention of this section the *master and owner* of the ship shall be guilty of an offence and shall...."

The first observation that I would make is that, if as I believe it to be accurate that the question is one which is to be determined turns upon the construction of sections, not that one case can be authority for another.

However, if it is proved that any partner is actually involved in the appointment of the master and sending the ship to sea, then different considerations must apply.

It is in evidence that Lau Ka Hin and Voon Wee Hian were at the port together with Lee Lai Siew and all three appellants had knowledge of the condition of and also knowledge of what transpired in the ship.

The Magistrate's view as to the excessive number of passengers and the importance he demonstrably attached to 172 (but which this court has found the number to be 147) must have coloured his approach in passing the maximum sentence he gave namely $1000 in respect of Lee Lai Siew and Lau Ka Hin. That being so, I now alter the fines on them from $1000 to $500 or in default three months' imprisonment, bearing in mind that this is their first offence. In regard to Voon Wee Hian, I alter his fine from $500 to $250 in default three months' imprisonment.

As regards the other two partners, namely Pao Chong Zen and Shim Si Yong, there will be an order that their conviction be quashed and their sentences set aside. Their fines, if paid shall be refunded to them.

The fines, if paid in excess by Lee Lai Siew, Lau Ka Hin and Voon Wee Hian, shall be refunded to them.

Load-line, Section 169

That brings me to the consideration of the Third Charge.

As against *Lee Lai Siew*, the charge is: —

"That you on the date and time and at the place above-mentioned were the master of the ship 'Nunukan Express' which was so loaded as to submerge in salt water the load-line indicating the maximum depth to which the ship was entitled under the Load Line Rules to be loaded in contravention of section 169(1) Merchant Shipping Ordinance, 1960, and thereby committed an offence punishable under section 169(2) of the said Ordinance."

As against the *owners*, the charge reads: —

"That you on the date and time and at the place above-mentioned were the owners of the ship 'Nunukan Express' which was so loaded as to submerge in salt water the load-line indicating the maximum depth to which the ship was entitled under the Load Line Rules to be loaded in contravention of section 169(1) of the Merchant Shipping Ordinance 1960, and thereby committed an offence punishable under section 169(2) of the said Ordinance."

The defence has attacked the judgment of the learned Magistrate on a number of grounds, the most important ground of which is that there was no evidence in the prosecution's case to substantiate the essential ingredient that in fact the appropriate load-line on each side of 'Nunukan Express' was submerged at the material time.

The evidence of the witnesses relevant on this point according to the record is: —

PW24 — Boo Yaw Lan. He says:

"There was a small vessel berthed alongside the 'Nunukan Express'. I did go over to the small vessel alongside to get fresh air. I could see the load-line of the 'Nunukan Express'. It was under the water — I don't know how deep... The boat in which I was seated before the boat was left (sic) *slightly rocking and floating up and down.* The water mark line and the load-line when I saw the water line had gone down so that I could not see. *It could be the waves may have covered.* I only look for a while. I would say that the *straight line is definitely under water but it could be caused by the waves coming to cover the line.*"

PW41 — Kassim bin Lalah

"I saw the load-line. I saw a circular mark when I was approaching the boat on the right.... I saw a loadmark. I was still on the jetty... I came from the stairs and front of the boat was facing the sea."

Next, the lower court admitted and accepted the evidence of *Mr. Easton (PW107)* as to the approximate weight of passengers both adult and children, and calculated their mean weight, passengers and crew effects and baggages both cargo specified and unspecified, fuel and water, sprockets, boxes and nails, 400 soft drinks, boxes of milk etc.

I would add that it is in evidence that: —

(a) weighing of passengers took place 5 months after the incident;

(b) Mr. Easton did not carry out the survey until March 29, 1975, i.e. 25 days later;

(c) Sprockets — it was 5 months after the incident. They were not brought to Tractors Malaysia when he pointed to exhibits which are similar to the sprockets. The sprockets were not found, weighed nor marked as exhibits. Neither were the samples produced as exhibits;

(d) Cargo Manifest showed "nil". There is no evidence of manifest stating the cargo nor is there any declaration of cargo in the outward manifest;

(e) 4 jerry cans of drinking water — no evidence as to their sizes;

(f) Zinc sheets — no evidence as to who measured them, nor were samples produced in court.

It is important to observe that *Mr. Easton (PW107)* has given evidence as to the best method of determining submersion. He said (page 115 of Record): —

"If a vessel had excessive weight and its load-line submerged in the salt water, the best method is to stop vessel, take the specific gravity of the water in which she is floating, escort her to place where *the water is smooth unbroken by waves* and measure the submergence and specific gravity of the new water, and then comparing the two specific gravities calculate the submergence of the load-line when she was stopped.

The engine is to be stopped and the whole boat in as still a state of affairs as possible. In this hypothetical case, assuming that the boat has *not sunk both sides* of the load-line will be measured."

It becomes necessary to refer to the provisions of section 169(1) of the Ordinance wherein the legislature has provided the manner in which submersion of a load-line is to be ascertained.

Section 169(1) is in these terms: —

"A North Borneo load-line ship shall not be so loaded as to submerge in salt water, when the ship has no list, *the appropriate load-line on each side of the ship, that is to say the load line indicating or purporting to indicate that maximum depth* to which the ship is for the time being entitled under the load line rules to be loaded."

Thus, the statute has prescribed a special legal procedure to be followed. It is the function of the lower court and this court to adhere to such a provision. I do not see any reason in the present case for considering whether there is no other way of construing the words of the Ordinance. If the words of the Ordinance are clear it is not the function of the court to struggle to find some other way of construing them. The words of the legislature are the text of the law and must be obeyed.

As exhibits are prominently featured in this case the court was referred to the case of *Shaik Meera & Anor.* v. *R.*[18] where Spenser Wilkinson J. said at page 159:

"There are certain parts of a prosecution case which as a matter of practice the courts always expect to be proved as strictly as possible and one of these is proof that an exhibit produced in court is the very thing which was found or used ... and that it has not been tampered with in the meantime."

On the point of presumptions, *Wills'* Principles of Circumstantial Evidence, 7th edition, at page 26, observes: —

"In criminal jurisprudence, therefore arbitrary presumptions should be sparingly admitted, and even when they are so, they occasionally work injustice."

In my view the prosecution has not discharged the burden imposed on it by section 169(1) of the Ordinance. For the reasons mentioned above I am unable to agree with the court below that on the basis of the facts found by it the appellants could have been held guilty under section 169(1).

Like Ong J. (afterwards Chief Justice Malaya) in *Mohamed Ali* v. *Public Prosecutor*,[19] although I am as satisfied as was the learned Magistrate that the ship was overloaded, I am equally satisfied that in law their conviction cannot under any circumstances be upheld.

In those circumstances, this court feels bound to quash the convictions. There will therefore be an order that the convictions on the charges be quashed, the sentences set aside and the fines, if paid, be refunded to the appellants.

Unseaworthy, Section 197(2)

I come to consider the Fifth Charge — section 197(2) of the Ordinance.

As against Lee Lai Siew the charge reads:

"That you on the date and time and at the place above-mentioned being the master of the ship 'Nunukan Express' knowingly took the said ship to sea from Tawau port in such an unseaworthy state that the life of any person was likely to be thereby endangered and you thereby committed an offence punishable under section 196(2), Merchant Shipping Ordinance, 1970.

As against the owner, the charge reads: —

"That you on the date and time and at the place above-mentioned were the owners of the ship 'Nunukan Express' did sent to sea the said ship in such an unseaworthy state that the life of any person was likely to be endangered and you thereby committed an offence punishable under section 197(1), Merchant Shipping Ordinance, 1960."

Objection was made with which I am inclined to agree that a conviction under the Penal Code and also under the special law in respect of one and the same offence is illegal. (see *R.* v. *Ramanchandrappan*,[20] also cited in *Mallal's* Criminal Procedure, 4th edition, at page 18).

There is unfortunately no report of the reasons for the conclusion arrived at in that case. I have not had the advantage of reading the case as it is not available in the Library. As the matter stands, I express no concluded opinion.

However, appellant Lee Lai Siew was originally charged with the Fourth Charge under section 304A, Penal Code, with an alternative charge under section 197(2), Merchant Shipping Ordinance, 1960. In the course of the trial in the lower court application to amend the charges was made by the prosecution and granted by the learned Magistrate by the deletion of the word "alternatively" and by re-numbering that charge as Charge No. 6.

Counsel submitted that the ingredient of section 304A, Penal Code, namely "took the ship to sea in such a state ... as to endanger human life" is the same as the ingredient in section 197(2) of the Ordinance, namely "took the ship to sea in such an unseaworthy state that the life of any person was likely to be thereby endangered" and therefore illegal for the reason referred to above.

Assuming I am wrong and that the prosecution is right in amending the charges as it did, I will now proceed to deal with the charge as it stands.

The worth "unseaworthy" mentioned in the charges is nowhere defined in the Ordinance.

The prosecution contended that "unseaworthy" has the same meaning assigned to it in the *Carriage of Goods by Sea Act* (see "Carriage of Goods by Sea", 9th edition, pages 84 and 85; *Hardy Ivamy's Case Book on "Carriage by Sea"*, 2nd edition, pages 1 and 3; *Halsbury's Laws of England*, 3rd edition, Volume 35 at pages 401 to 403, and Volume IV (Carriers) at pages 141 to 143) and may therefore serve as a guide.

It seems to me had the legislature intended that to be so nothing would be easier than to lay down in terms. To illustrate this I refer to the case of

Federal Steam Navigation Co. v. *Dept. of Trade*[17] in which Lord Morris said at page 109: —

"The Oil in Navigable Waters Act 1955 has an interpretation section, i.e. section 22, and it is relevant to note that by section 22(6) it is provided:

'Subject to the preceding subsection, expressions used in this Act and in the Merchant Shipping Act, 1894, have the same meanings in this Act as in that Act'."

In the state of things, it seems to me therefore that the court has to decide this question on basic principle with virtually no guidance from authority. One then turns to dictionaries for assistance as to the meaning of the word "seaworthy". In *Chambers Twentieth Century Dictionary* (Reprinted 1974) at page 1221, the word "unseaworthy" is not defined, but "seaworthy" means: "fit for sea, able to endure stormy weather".

Now the owners of "Nunukan Express" was licensed to provide service between Tawau and Nunukan and vice versa. There was according to the defence, no evidence to prove that any of the appellants knew the fire equipment or the pumping system was unsatisfactory. The Safety Certificate (Exhibit D2) to which reference was made, was issued on October 21, 1974. It covered the period of the incident, i.e. March 4, 1974 of which the appellants were charged. The next inspection of the ship was not due until October 1975.

The defence says that there was no evidence of unseaworthiness. The ship arrived that afternoon in perfect condition.

The prosecution on the other hand relied on the evidence of Mr. Easton (PW107).

Assuming that the charges are legal, I am inclined to agree with the prosecution that the following facts:—

(1) overloading;

(2) undermanning; and

(3) other defects;

contributed to the unseaworthiness of the ship.

Turning to section 197(1) of the Ordinance, the opening words are: —

"*Any person* who sends, or attempt to send or is a party to sending . . . a North Borneo ship to sea . . . in such an unseaworthy state. . . ."

and according to *Public Prosecutor* v. *Lim Teik Heng*[21] a decision based on the Merchant Shipping Ordinance, 1953 of Malaya, on the construction of section 313(b) of that Ordinance, the court held that it is essential that the prosecution prove who that "any person" is in the particular case.

It seems to me that there is ample evidence from which to identify "any person" and the word "person" has been defined to include a body of persons, corporate or unincorporated under the Interpretation Ordinance. That being so, it seems plain that the three appellants, Lee Lai Siew, Lau Ka Hin and Voon Wee Hian fall squarely within the terms of section 197(1) of the Ordinance.

The other two appellants, namely Pao Chong Zen and Shim Si Yong are to my mind properly excluded from the operation of the section. Neither of them in my view falls within the area of the law which was canvassed in *Lim Teck Heng's* case.

I am of opinion that their appeal must succeed, and their convictions and sentences must be set aside.

It would be appropriate at this stage to consider the question of sentence in respect of the other appellants. I would here refer to *Ratanlal*. I do so for the reason that both sections, i.e. section 304A and section 197(2) have as I have earlier indicated, the same ingredient and both sections impose a maximum term of two years' imprisonment. The learned author there observes at page 819: —

"For an offence under this section a term of *imprisonment is not a must.* The section visualises the possibility of an offence falling under it being penalised by *mere fine.*"

I am fortified in my view by the consideration in the case of *Federal System Navigation Co.* referred to earlier where Lord Salmon said at page 115 — on equipment: —

"If the vessel is not fitted with the proper equipment and the master knows it, he should refuse to put to sea until the vessel is properly equipped. If he puts to sea when there has been some contravention of section 5 of which he could not have known, no court, were he to be prosecuted, would do more than impose a nominal fine, or give him an absolute discharge."

There can be no doubt whatever that Lau Ka Hin and Voon Wee Hian, two partners, approached the Port Officer, Masri, with knowledge of the fact that Lee Lai Siew was not possessed of a Certificate of Competency. Further the knowledge of overloading and other defects of the ship can be imputed to all three appellants.

The ends of justice will be met, if I: —

(a) set aside the conviction of six months' imprisonment in respect of Lee Lai Siew and in lieu thereof impose a fine of $500 in default 3 months' imprisonment.

(b) alter the fine of $1500 imposed on Lau Ka Hin to $500 in default 3 months' imprisonment.

(c) alter the fine of $750 imposed on Voon Wee Hian to $500 in default 3 months' imprisonment.

The fines, if paid by the other two partners Pao Chong Zen and Shim Si Yong shall be refunded to them.

The fine if paid in excess by Lee Lai Siew, Lau Ka Hin and Voon Wee Hian shall also be refunded to them.

Section 145(2) and (3)

I turn now to the Third Charge.

Against Lee Lai Siew, the charge reads: —

"That you on the date and time and at the place abovementioned being the master of the passenger ship 'Nunukan Express' having obtained port clearance to proceed to sea with 80 passengers, proceeded to sea with 172 passengers which was 92 passengers in excess of 80 passengers allowed by the clearance and thereby committed an offence punishable under section 145(2), Merchant Shipping Ordinance, 1960."

Against the owners of the 'Nunukan Express':—

"That you on March 4, 1975 at about 5.30 p.m. in the waters

off the coast of Tawau, in the District of Tawau in the State of Sabah, were the owners of the ship 'Nunukan Express' which having obtained port clearance for 80 passengers proceeded to sea with 172 passengers which was 92 passengers in excess of the 80 passengers allowed by the port clearance and thereby committed an offence punishable under section 145(3), Merchant Shipping Ordinance 1960."

It is necessary in this connection to set out the provisions of section 145(2) and (3).

"145(2) The master of any ship who after having obtained port clearance, plies or proceeds to sea with any number of passengers greater than that allowed by the clearance shall be guilty of an offence and shall be liable to a fine of five hundred dollars, in addition to a fine of fifty dollars for every passenger in excess of the number permitted to be carried by the clearance.

145(3) When the master of any ship has become liable under the provisions of subsection (2) to the penalty therein mentioned, the owner, agent or charterer of such ship shall be liable to a like penalty unless he proves that such passengers were shipped without his knowledge or consent, and that he derived no profit, benefit or advantage from the shipping of such passengers."

The court below has found (with which I agree) that there were passengers in excess of the number allowed on the ship.

The prosecution says that the penalty is of the same amount recoverable from each of the owners. The defence, on the other hand, contend that the appropriate penalty is the equivalent of the fine, in total, imposed on the master recoverable from the owners or owners jointly and severally. There is no case to which either counsel can refer this court or which I have been able to discover to which the particular matter arose.

In construing the relevant sections of the Act if there appears any reasonable doubt or ambiguity, then being a penal statute I must apply the principles laid down by Lord Esher in *Tuck & Son* v. *Priester*[22]:

"We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections."

The appropriate penalty therefore should be a multiple of it and not a fine *in cumulo* imposed on the master, and I so hold.

I have earlier reached the conclusion that the number of passengers in excess of the authorised number is 147. The authorised number allowed on board the ship is 84 (exhibit D2) so the excess is 147—84= 63 passengers.

The fine of $50 for every passenger in excess of the number permitted to be carried by the clearance. The total therefore is 63 × $50 = $3150 divided by 5 = $630.

The sum of $3150 is the profit which is due to Syarikat Kalimantan Enterprise Tawau of which all four appellants are partners. That they as partners have derived profit therefrom is in my view beyond argument.

Accordingly, I alter the fine of $5000 in respect of Lee Lai Siew and Lau Ka Hin to $1030 (i.e. $400 + $630) and in respect of the other three appellants, Voon Wee Hian, Pao Chong Zen and Shim Si Yong, I alter the fine imposed on them from $2500 to $839 (i.e. $200 + $630).

The fines if paid in excess by the above appellants shall be refunded to them.

Masri bin Mohd. Taha — Complaint of Director

It remains now only to deal with two matters: —

(a) The conduct of the Port Officer, Marine Department, Tawau; and

(b) The absence of complaint of the Director by whom prosecutions are instituted.

Firstly, I refer to the Port Officer, Masri bin Mohamed Taha (PW127) who granted the port clearance and approved the appointment of Lee Lai Siew as Master of 'Nunukan Express'. Masri's evidence is

"Before a passenger ship leaves the Tawau harbour the owner is required to submit to the Marine Department —

(1) Application for port clearance

(2) Passenger List and Crew List; and

(3) Cargo Manifest."

and further down (to which reference has been made at the risk of repetition): —

"He (Christopher Chong) told me that the 'Nunukan Express' has no juragan. I told Christopher Chong not to issue a port clearance. Lau Ka Hin suggested to me to authorise Lee Lai Siew to act as master. He told me that the usual master has gone on leave from February 26, 1975. Lee Lai Siew referred to me by Lau Ka Hin is known to me as a sailor... I interviewed him (Lee). Lee told me that he has about 10 years' experience in the sea as a sailor. I considered him to be competent to act as a master. I know that the law requires the master of a ship should have a certificate of competency. But I authorised him because of his experience."

It is convenient at this stage to set out section 4 of the Ordinance, which reads: —

"Section 4 — An officer shall *not be deemed to be duly certificated under this Ordinance* unless he is the holder for the time being *of a valid certificate of competency* granted under this Ordinance, or under any written law in force in North Borneo immediately before the commencement of this Ordinance of a grade appropriate to his station in the ship or of a higher grade.

Provided that any officer in a home trade, local trade or coastal trade ship holding an equivalent certificate of competency issued by the Government of Singapore, Malaya, Brunei or Sarawak shall be deemed to be duly certificated as such for the purpose of this Ordinance."

It seems to me the law is clear, and *Masri* (PW127) in authorising Lee Lai Siew to be master of the ship had no such discretion in this case. Even assuming that he had a discretion he should have exercised it against the grant of the authorisation. His exercise of the discretion, if any, has in my opinion been exercised wrongly. Nor for the same reason should he have given the port clearance, although he had instructed Christopher Chong not to issue a port clearance in the first instance.

It is appropriate that I set out the provisions of section 145(4) which reads: —

"The Port Officer may refuse port clearance to any passenger ship except on the production of the passengers certificate (being a certificate then in force and applicable) and he may detain such ship until such certificate is produced."

Secondly, I would refer to the previous warnings of overloading by the ship.

The owners of Syarikat Kalimantan and the master of the ship had been warned before for carrying excess passengers on June 17, 1974 by letter: —

"This letter (exhibit P9) drew attention of the juragan that there were previous violations of the law against overloading; the dates were 1st December 1973 from Nunukan to Tawau number of passengers 86; 3rd January 1974 number of passengers 94; 7th January 1974 Nunukan to Tawau number of passengers 106; 8th January 1974 Nunukan to Tawau 117 passengers. The same letter informed the juragan that he will be liable to a fine of $1,000 and 6 months' imprisonment...."

and continues: —

"If the owners of the ship listed more passengers than the maximum we refuse to issue the port clearance. We had refused port clearance to 'Nunukan Express' before after we checked the vessel. In such cases the excess passengers were removed from the vessel...."

and further down: —

"There are surprise checks, now and then by the Marine Inspector or the Boarding Officers.

Sometimes I give instructions to check or my staff have commonsense to check. They can check on their own without reference to me... On 4th June there was no such report referred to me in respect of 'Nunukan Express'."

The learned Magistrate has this to say in his judgment at page 3 in *Criminal Appeal No. 15/76*: —

"*PW127 Masri bin Taha* stated positively that passengers and safety certificate dated October 21, 1974 (exhibit P8B) shows 84 passengers (no report was made by any Marine Officer as having been on board to check). A Marine Serang in uniform stood on the deck to look for a relative. He never went inside."

With respect, the lower court has omitted to consider the evidence of *Voo Yaw Lan (PW24).* In this respect I can find nothing in the judgment to indicate that the court had rejected his evidence as being unworthy of credit.

PW24 said: —

"When the vessel was about to leave two officers went into the vessel, one in white uniform and the other in brown uniform... I saw them go into the vessel...."

The question then arises; what were the two officers doing on board the ship? Had they chosen to shut their eyes and closed their ears to what transpired in the ship, and that the place was as one witness observed 'sardine-packed'?

I would here refer to section 169(5) of the Ordinance: —

"Without prejudice to any proceedings under the provisions of subsections (1) to (4) inclusive, any ship which is loaded in contravention of this section may be detained until she ceases to be so loaded."

I now pass to a consideration of the alleged *Absence of Complaint of the Director.* The law on this is to be found in sections 254 and 248 of the Ordinance.

Section 254 of the Ordinance provides: —

"The Director shall be the officer having the general superintendence of the administration of this Ordinance, and authorised to carry the provisions of this Ordinance into execution."

and *Section 248* is in these terms: —

"*No person shall be charged with any offence under this Ordinance,* other than an offence relating to discipline or order on board a ship, *except on the complaint of the Director* or any person authorised in writing in that behalf and...."

It was submitted on behalf of the prosecution that the prosecution had lodged a complaint before the Magistrate. The complaint however was not produced at the trial in the Magistrate's Court although a full hearing took place extending over many days. Nor was the complaint marked as an exhibit. The prosecution has at the High Court before me sought to put in the complaint. It was strenuously objected to by counsel for the defence, and I think rightly so for the reasons given at pages 20 and 21 of the notes. It was I consider rather late in the day, when the complaint ought to have been tendered in the lower court, before the trial began, but the prosecution failed to do so.

It was further the submission of the prosecution that if the complaint was not included in the proceedings now before the High Court the whole proceedings in the lower court would be a nullity with which I wholly agree.

Even assuming that the prosecution and I are both wrong in our views, I would only express the hope that the prosecution ought not in fairness to the appellants to be re-tried again for these offences since they were not only in jeopardy in the first trial, but were convicted and sentenced to which references had been made. To allow the prosecution to do so would I venture to add amount to allowing the prosecution to have a second bite at the cherry.

Order accordingly.

WAH TAT BANK BHD. v. WONG LEE KOK & ORS.

[O.C.J. (Tan Chiaw Thong J.) November 7, 1977]
[Borneo — Civil Suit No. 54 of 1977]

Practice and Procedure — Application for rateable distribution — One attaching judgment creditor — Scope of R.S.C. 1957, O.46A r.1(1)(c).

The plaintiff sought for an order under Order 46A rule 1(1)(c) to have the balance of the proceeds of the sale of ½ share of the 2nd defendant's land paid to him. Before the sale, the plaintiff had attached the land by a prohibitory order. He was the only judgment creditor.

Held, allowing the application: Order 46A rule 1(1)(c) could be construed to cover the present situation where there was only one judgment creditor who, prior to the sale of land, had attached the said land by way of execution.

SUMMONS IN CHAMBERS.

Dr. Chew Peng Hui for the plaintiff.

Tan Chiaw Thong J.: By this *ex parte* summons in chambers, the plaintiff seeks an order to have the balance of the proceeds of sale of the ½ share of the 2nd defendant in that parcel of land together with the building thereon situate at Mission Road, Sibu described as Lot 73, Block No. 5, Sibu Town District, which was sold under order of this court made under Originating Summons No. 60 of 1976, paid to him.

The application is made under O.46A of the Rules of the Supreme Court, 1957, rule 1(1)(c), and